IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-864

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Petitioners,*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The City of Lafayette, Louisiana and the City of Plaquemine, Louisiana (hereinafter "Cities") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 532 F. 2d 431. The opinion of the United States District Court for the Eastern District of Louisiana (Appendix B) is reported at 1975-1 CCH Trade Cases ¶ 60, 240.

JURISDICTION

The judgment of the court of appeals (Appendix C) was entered on May 27, 1976. On June 9, 1976 the Cities timely filed a petition for rehearing *en banc*. The court of appeals entered an order (Appendix D) denying the Cities' petition for rehearing on October 4, 1976. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Relying on this Court's decision in *Goldfarb* v. *Virginia State Bar, infra,* the court of appeals ruled that actions of the Cities, political subdivisions of the State of Louisiana, might constitute violations of the antitrust laws (15 U.S.C. § 1 *et. seq.*). The question presented is whether such city governments are subject to causes of action and treble damage liability under the federal antitrust laws.

STATUTES INVOLVED

The case concerns the intended scope of federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 and Section 3 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 14. (These statutory provisions are set forth in Appendix E).

STATEMENT OF THE CASE

This petition arises from the district court's dismissal of an amended counterclaim filed by the respondent Louisiana Power & Light Company (hereinafter "LP&L") in *City of Lafayette, Louisiana and City of Plaquemine, Louisiana* v. *Louisiana Power &*

Light Company et al. Civil Action No. 73-1970, Section E (E.D. La.), an action filed by the Cities on July 24, 1973. The Cities' complaint alleges that LP&L combined and conspired with other privately owned utilities to restrain and monopolize interstate commerce in the generation, transmission and sale of electric power and energy in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Although two of the original defendants have settled and been dismissed from the action, the case remains pending in the district court against LP&L and its parent corporation Middle South Utilities, Inc.

LP&L's counterclaim alleges that the Cities have violated the federal antitrust laws in the operation of their municipal electric utility systems.[1] Four independent allegations were contained in the amended counterclaim: that the Cities engaged in sham and frivolous litigation against LP&L before several federal regulatory agencies, the United States Department of Justice and the federal courts in connection with LP&L's planned construction of a nuclear elec-

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[1] The Cities as political subdivisions of the State of Louisiana are empowered by the Constitution of the State of Louisiana to exercise any governmental power not inconsistent with the state constitution and not denied by their charters or by general law. *See,* Article VI, Section 7(a) of the Constitution of the State of Louisiana. (*See also,* Article XIV, Section 40(a) of the constitution in effect prior to January 1, 1975.) Further, Louisiana statute provides that cities may "acquire by condemnation or otherwise, construct, own, lease and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities." Louisiana Acts 1918, No. 160, § 3 (LSA-RS 33:621) *See also,* LSA-RS 33:4163. These constitutional and statutory provisions are set forth in Appendix F.

tric generating facility;[2] that the Cities each included in their municipal utility bonds covenants with the bondholders to exclude competition from other utilities in the provision of electric power and energy within their municipal boundaries; that the Cities had agreed with others for the provision of electric power and energy in their market areas for a term longer than that lawful under state law in an attempt to exclude competition in such markets; and that the City of Plaquemine contracted with certain customers to provide water and gas service on the condition that such customers also purchase electricity from the City. The counterclaim alleged that LP&L's damages resulting from the Cities' conduct were in excess of $180 million.

On March 3, 1975 the district court dismissed LP&L's amended counterclaim. Relying principally upon this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), and the Fifth Circuit's decision in *Saenz* v. *University Interscholastic League*, 487 F. 2d 1026 (5th Cir. 1973), the district court ruled that the Cities engaging in "purely state government activities are not subject to the requirements of the antitrust laws of the United States." (Appendix B at p. 13a). Final judgment on LP&L's amended counterclaim was entered pursuant to Rule 54(b), Fed. R. Civ. P., on March 13, 1975, and an appeal was taken by LP&L to the Fifth Circuit.

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[2] The so-called sham litigation referred to in this charge includes the proceedings which resulted in this Court's decision in *Gulf State Utilities Co.* v. *FPC*, 411 U.S. 747 (1973), as well as a proceeding in the then Atomic Energy Commission in which the Justice Department and the Cities as intervenors charged LP&L, in connection with its nuclear license application, with activities inconsistent with the antitrust laws, as provided for in Section 105 of the Atomic Energy Act, 42 U.S.C. § 2135.

In an opinion dated May 27, 1976, the Fifth Circuit, relying upon its interpretation of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), held "that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws." (Appendix A at p. 8a). Without recognition of the critical legal and factual distinctions between this case and *Goldfarb*, the court found that the *Goldfarb* decision controlled the question of the application of the federal antitrust laws to the actions of the Cities. It ruled that for state governmental bodies to avoid antitrust liability it must be shown that the state legislature in granting authority to the governmental bodies specifically contemplated the alleged anticompetitive restraint and that "the challenged activity was clearly within the legislative intent." (Appendix A at p. 5a). On June 9, 1976 the Cities filed a petition for rehearing *en banc*, arguing that the court of appeals had misapprehended the *Goldfarb* decision, and later brought to the Court's attention the July 6, 1976 decision in *Cantor* v. *Detroit Edison Co.*, —— U.S. ——, 96 S. Ct. 3110, which the Cities felt relevant to the deliberations of the court of appeals. On October 4, 1976 the court of appeals denied the Cities' petition for rehearing without comment.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's Decision Misapplies *Goldfarb* and Conflicts with the Ninth Circuit's Decision in *New Mexico*.

The question before this Court is the intended scope of the federal antitrust laws—specifically whether Congress intended these laws to apply to the actions of

state governmental units.[3] Contrary to the implications of the three decisions of this Court which relate to the question, *Parker* v. *Brown*, 317 U.S. 341 (1943); *Goldfarb* v. *Virginia State Bar, supra*; and *Cantor* v. *Detroit Edison Co., supra*, the Fifth Circuit has ruled that the actions of cities may violate the federal antitrust laws and that such local political units of state government may be subject to treble damage liability in suits brought by private corporations. This ruling by the Fifth Circuit is in conflict with the decisions of another circuit court[4] and language in its own recent decision *Litton Systems, Inc.* v. *Southwestern Bell Telephone Co.*, 539 F. 2d 418, 422 n. 8 (5th Cir. 1976).

While the *Goldfarb* and *Cantor* decisions have provided clarification of the *Parker* v. *Brown* doctrine in cases where private parties are sued, *Goldfarb* has since been interpreted so as to create a split between the circuit courts on the question of the applicability of the federal antitrust laws to city governments. Until the conflict is resolved by this Court, the interim effect and uncertainty created by the Fifth Circuit's decision on the conduct of state and local government will be profound. The question and the conflict among the circuit courts presented by this case are, therefore, in urgent need of resolution. The related question of the

[3] The issue here is not one of the Sherman Act superseding or preempting the acts of state governmental bodies, but whether state bodies are subject to prosecution for violation of the federal law.

[4] In *New Mexico* v. *American Petrofina, Inc.*, 501 F. 2d 363 (9th Cir. 1974), the court held that the federal antitrust laws were not intended to apply to the activities of the states or their cities and counties. On the other hand the Third Circuit, like the Fifth, has recently relied upon *Goldfarb* to rule that municipal corporations are subject to this body of federal law. *Duke & Co., Inc.* v. *Foerster*, 521 F. 2d 1277 (3rd Cir. 1975).

applicability of the antitrust laws to the judicial branch of state government is before the Court this term in *Bates* v. *State Bar of Arizona*, No. 76-316, *prob. juris. noted*, October 4, 1976. The Cities suggest that by hearing their case as well as *Bates* the Court will have the opportunity to respond to the questions left unanswered by *Goldfarb* and *Cantor* and resolve the conflict between the circuit courts on the question of applying the federal antitrust laws to state bodies.

In *Parker* v. *Brown, supra*, this Court held that, in passing the Sherman Act, Congress did not intend to include "state action or official action directed by a state" within the Act's prohibitions. 317 U.S. at 351. The Court stated further that:

> There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. (citations omitted) 317 U.S. at 351.

Since the *Parker* v. *Brown* decision, several of the circuit courts have also held the Sherman Act to be inapplicable to the actions of subordinate state governmental bodies.[5] In this case, however, the Fifth Circuit

[5] *See, e.g. Saenz* v. *University Interscholastic League, supra*, (bureau of the state university administering a slide rule contest); *New Mexico* v. *American Petrofina, Inc., supra*, (cities and counties purchasing asphalt); *Howard* v. *State Department of Highways of Colorado*, 478 F. 2d 581 (10th Cir. 1973) (state agency restricting highway advertising); *Padgett* v. *Louisville and Jefferson County*

took the position that this Court's intervening *Goldfarb* decision required a contrary conclusion.

In *Goldfarb,* this Court was called upon to decide when a private party could find shelter under the state action doctrine. That case involved an antitrust challenge to a minimum fee schedule established by a county bar association. Also named as a defendant was the Virginia State Bar. The Court rejected the State Bar's attempt to avail itself of state action protection because it found this organization of private attorneys although "a state agency for some limited purposes . . . has voluntarily joined in what is essentially a private anti-competitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." 421 U.S. at 791-92. With respect to the anticompetitive conduct alleged in *Goldfarb,* the Virginia State Bar was acting not as an agent of the State but in the pecuniary interests of its private members. Mr. Justice Stewart in his dissent in *Cantor, supra,* confirms that *Goldfarb* involved private not public conduct. Reviewing the decision, Mr. Justice Stewart states that "*Goldfarb* clarified *Parker* by holding that *private* conduct, if it is to come within the state-action exemption, must be not merely 'prompted' but 'compelled' by state action." —— U.S. ——, 96 S. Ct. at 3139 (emphasis added); *see also, Id.* at 3132-33.

However, in its decision in this case the Fifth Court misapprehended *Goldfarb* by viewing the challenged

Air Board, 492 F. 2d 1258 (6th Cir. 1974) (joint county agency contracting for taxi services at an airport); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency of Missouri-Illinois Metropolitan District,* 433 F. 2d 131 (8th Cir. 1970) (bi-state agency operating a public bus system); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F. 2d 52 (1st Cir.), *cert. denied,* 385 U.S. 947 (1966) (state agency contracting for airport services).

activities of the Virginia State Bar as activities of a "state agency," (Appendix A at p. 3a), which like the Cities, is a "governmental entity," (Appendix A at p. 4a n. 5). The distinction between the essentially private acts for private gain in *Goldfarb* and the direct acts of city government in providing municipal services involved in the instant case was ignored by the court below when it read *Goldfarb* to "require" its holding that "[a] subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." (Appendix A at p. 4a). The Cities agree that *Goldfarb* has made it more difficult for private parties to seek protection under the shield of state action. However, the Cities contend that the *Goldfarb* decision did not purport to rule on the question which was before the Fifth Circuit and is presented here, and that *Goldfarb* does not support application of the federal antitrust laws to the direct activities of state governmental units.[8]

Cantor, like *Goldfarb,* concerned an antitrust attack on private action. The defendant, The Detroit Edison Company, argued unsuccessfully that its acts had been approved by an agency of the state and were, therefore, beyond the reach of the federal antitrust laws. Although the several opinions differed as to the proper scope of the *Parker* v. *Brown* doctrine when applied to private conduct endorsed to some degree by state action, they agreed that the Sherman Act does not apply

[8] The United States also takes the position that *Goldfarb* involved "a private body . . . comprised of persons having a direct financial interest in the subject matter of the anticompetitive restraint", and distinguishes *Goldfarb* from a situation where an agency of state government is itself charged with violations of the federal antitrust laws. Brief for the United States as Amicus Curiae at 18, *Bates* v. *State Bar of Arizona, supra.*

to the activities of the state. In this respect, the opinions in *Cantor* support the Cities' contention that the Fifth Circuit has erred in its ruling in this case.[7]

Commentators, like the members of this Court in *Cantor,* have disagreed over the precise scope of the *Parker* v. *Brown* doctrine, but it seems that they do agree that *Parker* v. *Brown* provides shelter "where the defendants are either the state, one of its subdivisions, or state officials acting under the color of state authority or sovereignty." *Handler, The Current Attack on the Parker* v. *Brown State Action Doctrine,* 76 Colum. L. Rev. 1, 8-9 (1976). *Accord, Parker* v. *Brown—The Great Bicentennial Celebration,* Remarks by Donald I. Baker, Assistant Attorney General, Antitrust Division, United States Department of Justice before the Council of the ABA Public Utility Law

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[7] Although the dicta in the *Cantor* opinions speak to the question of the applicability of the federal antitrust laws to the activities of the states and their officials (*see,* plurality opinion, 96 S. Ct. at 3117, 3122; Burger, C.J., concurring, *Id.* at 3123; Blackmun, J., concurring, *Id.,* at 3128 n. 5; Stewart, J., dissenting, *Id.* at 3131-32, 3139-40) and not specifically to their political subdivisions, policy considerations would not favor such a distinction between the state and the subordinate entities of the government to which the state delegates its power and authority. The Sherman Act itself provides no basis for such a distinction. Moreover, the language of *Goldfarb,* speaking in terms of actions of the state "as sovereign," 421 U.S. at 791, does not provide a basis for treating the Cities differently than the state. It is axiomatic that municipalities are "instrumentalities of the state for the convenient administration of government within their [illegible] *State of Louisiana* v. *City of New Orleans,* 109 U.S. 285, 287 [illegible] and accordingly "their powers are such as belong to sovereignty" *Klein* v. *New Orleans,* 99 U.S. 149, 150 (1878). Municipalities, indeed, "exercise locally . . . the sovereign power of" the state. *Breard* v. *City of Alexandria, La.,* 341 U.S. 622, 640 (1951). *Accord., Vilas* v. *Manila,* 220 U.S. 345, 356 (1911).

Section, White Sulphur Springs, West Virginia (October 28, 1976).

Failure to recognize the important distinction between private and public action is, therefore, the genesis of the Fifth Circuit's improper analysis and erroneous conclusion as to the applicability of the federal antitrust laws to the Cities. Likewise, it provides the basis for the specific legislative mandate standard which the court below would, inappropriately, impose on remand. It is reasonable and logical, because there is no question that private parties are subject to the federal antitrust laws, that specific direction by state law should be required in order to insulate such private interests from prosecution under those statutes. However, where it has been held that the antitrust laws do not apply to the actions of the states, reason and logic dictate that, when a political subdivision of state government is charged, the inquiry of the court need not proceed beyond a determination that the body is indeed a political subdivision of the state.

This approach was adopted in *New Mexico* v. *American Petrofina, Inc.,* 501 F. 2d 363 (9th Cir. 1974), the court of appeals decision most directly on point and most directly in conflict with the Fifth Circuit's ruling in this case. In *New Mexico* the court affirmed the dismissal of an antitrust counterclaim directed at the state and various of its cities and counties. The Ninth Circuit, noting the *Parker* v. *Brown* analysis and that the Sherman Act is a criminal statute, rejected the argument that the state's immunity extends only to cases in which the legislature had mandated the conduct in question. The court recognized that such a test would be proper where private interests sought to

avoid antitrust penalties by "masquerading under the banner of 'state action' ", 501 F. 2d at 369, but held that "when there is no doubt that the defendant is the state [or a political subdivision of the state], the 'legislative mandate' analysis is unnecessary." 501 F. 2d at 370 & n. 15. The *New Mexico* court also concluded that the nature of the alleged anticompetitive action was not determinative, stating that "[t]he basis (grounded in federalism) for our conclusion that Congress did not intend the Sherman Act to apply to the states does not vary in strength depending on the specific activity in which the state engages." *Id.* at 371-72.

New Mexico is not in conflict with *Goldfarb* as suggested by the Fifth Circuit in this case. (Appendix A at p. 5a n. 8). The *New Mexico* court recognized that the legislative mandate test later set forth in *Goldfarb* should apply where private parties, such as the Virginia State Bar, are involved, but not where actual state governmental bodies are the alleged violators. The Cities submit that the *New Mexico* ruling is not diminished by *Goldfarb* and that a conflict among the circuits exists on the issue of the applicability of the federal antitrust laws to the activities of state political subdivisions.

Not only do the circuit courts disagree on the question of the applicability of the federal antitrust laws to activities of state governmental units, but also there is now an apparent difference of opinion as between panels of the Fifth Circuit itself.[8] The ruling in *New*

[8] On September 23, 1976, some four months after the ruling in the instant case and eleven days before the court summarily denied the Cities petition for an *en banc* rehearing, Judge Wisdom delivered an opinion in *Litton Systems Inc.* v. *Southwestern Bell*

Mexico and the language of the Fifth Circuit in *Litton* are irreconcilable with the ruling in this case, and dramatically illustrate the necessity for guidance and direction by this Court. The Cities here, and state and local governmental bodies across this nation, should be told whether or not the antitrust laws apply to them. Only this Court can alleviate the confusion.

2. The Fifth Circuit Decision Will Disrupt Essential Operations of City Government.

The importance of the issue in this case to state and local government cannot be gainsaid. Not only do state governmental entities operate electric utilities, they also run hospitals and public transportation systems. Municipalities collect garbage, provide water and gas, and offer educational services. Through zoning and other local ordinances municipal governments restrict the location of private businesses, and grant franchises and concessions of many kinds. Examples are numerous of state and local governmental action which if conducted by private persons or corporations might violate antitrust standards. This is true because the functions of local government often include exercise of "monopoly" power within local areas. Indeed, the exercise of such power is the essence of government itself.

Telephone Co., supra, interpreting *Goldfarb* and *Cantor* as they applied to a private party seeking protection from an antitrust attack on its marketing practices. In his opinion Judge Wisdom correctly noted that this Court had narrowed the state action doctrine as it applies to private parties, but in footnote 8 of his opinion approves the proposition that the Sherman Act does not apply to state action "where the defendant is a state or *division of a state*" 539 F. 2d at 422 (emphasis added).

Subjecting local governmental units to federal antitrust liability will necessarily stifle what has heretofore been considered proper governmental activity. The threat of both injunctions and treble damage liability will hang heavily over every locally elected official and the consequences of the Fifth Circuit's ruling will most certainly have a chilling effect upon local government. LP&L's counterclaim alleges single damages of $180 million. In oral argument before the court of appeals counsel for LP&L announced that the estimate of alleged damages had by that time been revised upwards to $500 million. Thus, the Cities' exposure after trebling could exceed $1.5 billion, an enormous bill for a few thousand taxpayers to meet. The threat of large damage claims against municipal governments is not an imaginary horrible. Elected officials contemplating a course of civic action may be unwilling to accept the economic and political risks created by the Fifth Circuit's decision.

The uncertainty resulting from the ruling of the court below is intensified by the unworkable standard which the decision imposes. First, liability would turn on the ability of the governmental entity to demonstrate in some way that the state legislature had contemplated the alleged anticompetitive conduct. The almost total lack of published legislative histories available at the state level may make this task impossible. The federal courts will be forced to second guess the purposes of state legislatures with little or no guidance from any quarter and create unnecessary interference in the administration of state and local government. Second, state legislatures give general, not specific, operating authority to their subordinate agencies. This practice is founded on sound public policy. Such legislation must necessarily be general to provide those who execute and administer it the essential flexibility to meet a variety of situations, foreseen and unforeseen. The test enunciated by the Fifth Circuit will place an unworkable burden on legislatures to predict specific acts and responses under the statutes and presciently provide for all of them in the very same statutes. Under such circumstances few cities can act with confidence in carrying out the functions of government.

Unlike private persons, political bodies are, by definition, charged with acting in the public interest. They are managed by elected officials responsible to the populace for their actions and subject to removal from office should the discharge of their duties not conform to the will and expectations of the electorate. Properly, abuses of public power by state and local officials have in most instances under our federal system been a matter for remedy by local law, state and local political action and actions for redress of violations of constitutional rights and limitations. (*See, e.g.*, Blackmun, J. concurrng in *Cantor*, 96 S.Ct. at 3127.) The federal antitrust laws with their provisions for criminal sanctions and treble damage liability have no place in this scheme and should not be applied to interfere with the public actions of locally elected officials in the discharge of their official functions.

The federal antitrust laws were enacted to protect the public from abuses of private economic power. *Parker* v. *Brown, supra,* at 351; *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 492-493 (1940). There is no evidence that Congress intended locally elected officials or the governmental bodies they serve to be subject to prosecution under the federal antitrust laws. Without

a clear indication of such an intent, application of these laws to local governmental action defeats the principles of our federalist system.[9] The Fifth Circuit's decision in this case is a misinterpretation of the scope of the federal antitrust laws and of this Court's prior decisions. Correction of this error should not wait until the first American city is bankrupted by a treble damage judgment or subjected to an injunction which interferes with the provision of governmental services.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] The integrality of the *Parker* v. *Brown* doctrine to constitutional federalism is persuasively argued by Professor Handler in his article, *The Current Attack on the Parker* v. *Brown Doctrine, supra.*

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs and Appellees,*

v.

LOUISIANA POWER & LIGHT COMPANY,
Defendant and Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(MAY 27, 1976)

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

TJOFLAT, *Circuit Judge.*

The sole question in this appeal is whether the actions of a city are automatically outside the scope of the federal antitrust laws. Answering in the negative, we reverse the decision below and remand for further proceedings.

I

A complaint filed on July 24, 1973, by the cities of Lafayette and Plaquemine, Louisiana (the Cities), alleged that appellant Louisiant Power & Light Company (Power & Light) and three other privately owned utilities had violated Sections 1 and 2 of the Sherman Act.[1] The allegations of this complaint are not involved in the present appeal. In its amended counterclaim, Power & Light charged the Cities with having themselves violated the federal anti-

[1] 15 U.S.C. Sections 1, 2.

trust laws in several respects. These allegations can be summarized as follows: (a) that the Cities were conducting sham litigation in order to delay or prevent Power & Light's construction of a nuclear power plant; (b) that anticompetitive covenants were included in the Cities' debentures;[2] (c) that the Cities had conspired with other parties to extend the provision of power to certain service areas beyond the time periods allowed by state law; (d) that the city of Plaquemine was requiring customers outside its city limits to purchase electricity from the city in order to obtain gas and water. All of these actions were alleged to violate Sections 1 and 2 of the Sherman Act. The "tie-in" of electricity to gas and water was alleged to violate Section 3 of the Clayton Act,[3] as well. In its order of February 28, 1975, the trial court dismissed the entire counterclaim. While noting its reluctance to exempt an enterprise which was "clearly a business activity" from the antitrust laws, the court held that the plaintiffs' status as cities was sufficient to bring all their conduct within the "state action" exemption as annnounced in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and as interpreted by this Court in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). Following the entry of final judgment dismissing Power & Light's counterclaim on March 13, 1975, this appeal was taken.

II

In *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Supreme

[2] These covenants were described as "covenants to exclude all competition in the provision of electric power and energy within [the plaintiffs'] municipal boundaries." Trial Record, at p. 14. The specific nature of the alleged covenants cannot be determined from the record before this Court.

[3] 15 U.S.C. Section 14.

Court has defined the extent to which state governmental entities are exempt from the antitrust laws. The earlier case was a suit to enjoin the enforcement of an agricultural marketing program which had been established by a California statute. Noting that the program "derived its authority and its efficacy from the legislative command of the state . . . ", 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 326, the Court held that the defendants' conduct was beyond the reach of the Sherman Act.[4] The Court could "find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," *id.* at 350, 51, 63 S.Ct. at 313, 87 L.Ed. at 326. By legislative command, the state had adopted an anticompetitive program and prescribed the terms of its operation. Violations were punishable under the state's penal code. In the Court's view, a restraint which the state, "as sovereign, imposed . . . as an act of government . . . ", could not be made the basis for Sherman Act liability. *Id.* 317 U.S. at 352, 63 S.Ct. at 314, 87 L.Ed. at 327.

The trial court in the present case acted without the benefit of the Supreme Court's only major post-*Parker* explication of the "state action" doctrine. In *Goldfarb*, *supra*, the High Court was faced with a Sherman Act challenge to minimum fee schedules published by a county bar association and enforced by the Virginia State Bar. The state bar was a state agency by law, *id.* 421 U.S. at 789-90, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 586-587, and both lower courts in *Goldfarb* had held that the bar qualified for the "state action" exemption.[5] Without dissent,

[4] The Court was willing to assume that the alleged activities would be illegal if carried out by private persons. 317 U.S. at 350, 63 S.Ct. at 313, 87 L.Ed. at 325.

[5] In contrast to the state bar, the county bar was a private association which was not a state agency by statute and which received no active state supervision. The district court, 355 F.Supp. 491

the Supreme Court rejected this contention. Although the state legislature had authorized the Supreme Court of Virginia to regulate the practice of law, *id.*, at 788, 95 S.Ct. at 2014, 44 L.Ed.2d at 585, that court had taken no action to fix lawyers' fees, *id.* 421 U.S. at 789, 95 S.Ct. at 2014, 44 L.Ed.2d at 586. Nor was there any state statute which directed members of the bar to establish minimum fee schedules. Therefore, the state bar's participation in price fixing failed to satisfy the "threshold inquiry" under *Parker*, i.e., "whether the activity is required by the State acting as sovereign," *id.* at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587.

Taken together, these two controlling precedents require the following analysis. A subordinate state governmental body [6] is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether

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(E.D.Va. 1973), held that the county bar was subject to the antitrust laws. The Court of Appeals, 497 F.2d 1 (4th Cir. 1974), agreed that the county bar was not covered by the "state action" exemption. However, its activities were seen as falling within a "learned profession" exemption to the Sherman Act, and as having an insufficient impact upon interstate commerce. Since the county bar, unlike the state bar in *Goldfarb*, and unlike the Cities in the present case, was not a governmental entity, the Supreme Court's disposition of its contentions will not be discussed here.

[6] Plaintiffs would have us equate cities and states for purposes of determining "state action". No authority is cited for this proposition, and the only appellate decision directly on point has resolved this issue against plaintiffs. See *Duke & Co.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975). Moreover, it can scarcely be said that, as a general proposition, cities are automatically entitled to whatever legal protections the state itself can claim. Thus, for example, cities, counties, and other state political subdivisions are not considered "the state" for purposes of Eleventh Amendment immunity. See *Edelman* v. *Jordan*, 415 U.S. 651, 667 n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Fay* v. *Fitzgerald*, 478 F.2d 181, 184 n. 3 (2d Cir. 1973); *Markham* v. *City of Newport News*, 292 F.2d 711, 716-17 (4th Cir. 1961).

the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent.[7] Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case.[8] A district judge's inquiry on this point should

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[7] The opinion in *Goldfarb* does not support defendant's claim that every alleged anticompetitive activity must be specifically approved by the legislature. Thus, the *Goldfarb* Court would apparently have found an exemption if the Supreme Court of Virginia, acting within the intended scope of its legislative grant, had established minimum fees. See 421 U.S. at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. See also note 8, *infra*.

[8] Our resolution of these general issues is in accord with that of the Third Circuit in *Duke & Co.* v. *Foerster*, *supra*, 521 F.2d at 1279-80. We have carefully studied the authorities cited by plaintiffs and have found nothing that directly contradicts the position which we take in this case. Unlike *Duke & Co.* and the present case, none of these decisions dealt with municipalities. Almost all of them are pre-*Goldfarb*. To the extent that *State of New Mexico* v. *American Petrofina* ,501 F.2d 363 (9th Cir. 1974) might be read as extending the "state action" exemption to lower governmental bodies' activities which were not contemplated by the legislature, we must regard it as in conflict with the Supreme Court's later decision in *Goldfarb*.

Brief mention should be made of plaintiffs' argument that a decision such as this will lead to undesirable variations in the application of the antitrust laws, since the governmental activities sub-

be broad enough to include all evidence which might show the scope of legislative intent.[9]

III

The Cities argue that a decision adverse to them would necessarily overrule this Court's prior opinion in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973). We are reminded of the general rule that one panel cannot overrule the holding of a previous panel of the same court. See *United States* v. *Automobile Club Ins. Co.*, 522 F.2d 1, 3 (5th Cir. 1975). However, we do not regard our decision as irreconcilably inconsistent with that in *Saenz*. The complaint in that case alleged that the director of a state slide rule contest induced a state agency to

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ject to the *Parker-Goldfarb* exemption will differ from state to state. We regard this as an inevitable result of the emphasis in *Parker* and *Goldfarb* upon the scope of legislative intent. For instance, the *Goldfarb* Court made it clear that a statute specifically establishing minimum fee schedules would lead to a "state action" umbrella. 421 U.S. at 790, 95 S.Ct. at 2015, 44 L.Ed.2d at 587. Such an emphasis upon what state laws provide will necessarily lead to variations, dependent upon the differing will of state legislatures.

Plaintiffs also draw our attention to the dicta in *Goldfarb* which suggest that the Supreme Court of Virginia could, without new statutory authority, impose minimum fee schedules by means of court rules. *Id.* at 788-91, 95 S.Ct. at 2014-2015, 44 L.Ed.2d at 585-587. Our reading of *Goldfarb* is that such rule-making would lead to a "state action" exemption only if the state court's rules fell within the intended scope of its legislative authority "to regulate the practice of law", *id.* 421 U.S. at 788, 95 S.Ct. at 2014, 44 L.Ed. at 586.

As a final point, we cannot accept defendant's invitation to import the discredited proprietary-governmental distinction into this area of the law. This contention is unsupported by authority and is irrelevant under *Parker* and *Goldfarb*, which look only to the scope of the legislative action and not the "proprietary" or "governmental" nature of the subordinate governmental body's conduct.

[9] Therefore, we reject the capricious limitation suggested by counsel at oral argument, which would restrict a court's inquiry to the pertinent statutes themselves.

define its regulations so as to exclude the plaintiff's slide rules from use in the contest. This action allegedly resulted from an unspecified economic tie between the director and a slide rule manufacturer which competed with plaintiff. As the panel noted, *id.* at 1028, the charge of an economic relationship between the director and the rival manufacturer was entitled to no weight, since plaintiff could not simply rely on his pleadings in the face of opposing affidavits. Stripped of the unsupported charge of financial influence, the allegations in *Saenz* must be seen as having stated no more than that (a) the director, "clearly acting within the scope of his duties," *id.* at 1028, determined that plaintiff's slide rule was not a "standard slide rule" which could be employed in the contest, and (b) the agency ratified that decision. It can scarcely be doubted that the agency's actions were within the contemplated scope of the powers conferred upon the state university system (of which the agency was a part) by the Texas legislature. The *Parker-Goldfarb* principle, as we have interpreted it, would clearly exempt such actions from the Sherman Act. We are, therefore, unpersuaded that there is any necessary conflict between our decision and the panel opinion in *Saenz*.

Even accepting *arguendo* the contention that *Saenz* automatically excludes subordinate state governmental bodies from the antitrust laws, we must still reject the notion that only an en banc Court could reach the result which we reach today. It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding. See *Davis* v. *Estelle*, 5th Cir., 529 F.2d 437, at p. 441 (1976). This is precisely the situation here. The argument that lower state entities are automatically exempt from the Sherman Act has been laid to rest by the Supreme Court in *Goldfarb*. The test now is whether the challenged action is the type of activity which the legislature intended the governmental body to perform. This principle has already been tacitly recognized by one post-*Goldfarb* panel of this Court. Faced with an antitrust challenge

to a city council's rate-making practices, the panel in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) was not content merely to note that the actor was a municipal body. Rather, the Court went on to ascertain that the state legislature had expressly delegated ratemaking authority to municipalities, *id.* at 1133. The legislature had also specifically charged municipalities with the duty of insuring a fair rate structure. The *Jeffrey* panel was unwilling to assume that the city council was doing anything other than carrying out this legislatively mandated duty when it took the actions complained of. *Id.* It will be observed that this is precisely the type of inquiry which our reading of *Goldfarb* and *Parker* would require. In our view, *Jeffrey* at least implicitly adopted the analysis which we have expressly employed today. The *Jeffrey* opinion, then, lends further support to our conclusion that, in the wake of *Goldfarb*, plaintiffs' interpretation of *Saenz* cannot be considered the law of this circuit.[10]

IV

To summarize, we conclude that the district court erred in holding the Cities' actions to be automatically beyond the reach of the federal antitrust laws. Upon remand, the court must determine whether the activities alleged fall within the intended scope of the powers granted to the Cities by the legislature. In their briefs on appeal, the Cities have provided copies of statutes which allegedly comprehend the acts involved in Power & Light's counterclaim. These are materials which should be submitted to the trial court in the first instance, together with all other relevant evidence.

REVERSED and REMANDED, with directions.

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[10] We are also unpersuaded by plaintiffs' reliance upon *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000, 89 S.Ct. 488, 21 L.Ed.2d 465 (1968). The various exemptions perceived by the *Alabama Power* panel were expressly derived from a judicial construction of the Rural Electrification Act in an antitrust context. No such problem of reconciling various federal statutes with one another is presented in the current appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 73-1970

SECTION "E"

Minute Entry
February 28, 1975
Cassibry, J.

CITY OF LAFAYETTE, LOUISIANA ET AL

Versus

LOUISIANA POWER & LIGHT COMPANY, ET AL

(FILED MARCH 3, 1975)

Order

IT IS THE ORDER OF THE COURT that the motion of LP&L to amend its' counterclaim be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to dismiss the entire counterclaim, as amended, be, and the same is hereby GRANTED.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate determination of this litigation. 28 U.S.C. § 1292(b).

REASONS

This action by the Cities of Lafayette and Plaquemine, Louisiana, alleges antitrust violations on the part of

Louisiana Power & Light Co., a Louisiana public utility (hereinafter LP&L), and others; plaintiffs seek injunctive relief and treble damages.

LP&L answered the suit and also filed a counterclaim, in which it alleged antitrust violations on the part of the plaintiff cities. Plaintiffs submitted an answer to the counterclaim denying all allegations. LP&L then filed a motion to amend its counterclaim and this motion was granted without opposition.

Subsequently, LP&L filed a new motion to amend its counterclaim, to include in it, allegations of Sherman and Clayton Act violations by plaintiffs in connection with certain tie-in arrangements. Specifically, LP&L claims that the City of Plaquemine has adopted a practice of offering residents outside of their municipal limits, such services as water, gas and sewerage, but only on the condition that they take electric service from the city and not from another supplier, *i.e.*, LP&L.

On September 13, 1974, this court denied LP&L's motion to amend its counterclaim holding that the antitrust laws of the United States do not apply to activities which are purely those of the state or its instrumentalities.

LP&L thereafter, filed a motion for reconsideration of this order. Simultaneously, the plaintiffs filed a motion to dismiss the original counterclaim. It is agreed among the parties that if the amended counterclaim is improper then the original counterclaim must fail for the same reason.

The sole issue therefore, is whether the antitrust laws of the United States are applicable to activities of a state or its municipalities.

Plaintiffs contend that the doctrine of nonapplicability of the antitrust laws to the states is a longstanding and well established rule. Once it is determined that the activities are those of the state no further inquiry is appropriate

because the antitrust laws do not apply. See *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (1974).

LP&L disagrees, and contends that the proper analysis of antitrust allegations against a state or its instrumentalities is a two step process. First, the court examines whether state activity is involved and secondly, the court decides whether the state is acting in a governmental capacity. Unless *both* steps are satisfied the state's actions can and should be answerable under the antitrust laws. In essence LP&L argues that if the state's activity is proprietary in nature then the antitrust laws *do* apply.

The inapplicability of the antitrust laws to the states was first enumerated in *Parker* v. *Brown*, 317 U.S. 341 (1943). The Supreme Court noted that:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.
>
> . . .
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. 317 U.S. at 351-52.

Subsequent cases have adopted as the rule of the *Parker* Case that the antitrust laws do not apply to state governmental actions, including those delegated to an agency or municipality of the State. *See Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966); *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363 (5th Cir. 1974).

However, other cases treat *Parker* in a less expansive way, permitting a court to examine the type or extent of state activity involved. *See Hecht* v. *Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971); *George R. Whitten Jr., Inc.* v. *Paddock Pool*

Buildings Inc., 424 F.2d 25 (1st Cir. 1970). However, these cases generally involve state action, in concert with private enterprise, thereby distinguishing them from the instant case.

The Fifth Circuit Court of Appeals in *Saenz* v. *University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973) has recently addressed itself to the question. The decision in that case clearly holds that state governmental entities are "outside the ambit of the Sherman Act. 487 F.2d at 1028.

In *Saenz*, a slide rule manufacturer brought a treble damage action alleging that the defendants had violated Section 1 of the Sherman Act by conspiring to effect the rejection of plaintiff's product for use in interscholastic competition among Texas public schools. The defendants included the University Interscholastic League (UIL), its director, Lenhart, and L. R. Ridgway Enterprises, Inc., a competitor of the plaintiff's, whose product was ultimately selected for use in the competition. UIL and Lenhart filed motions to dismiss the complaint on the grounds that as a state agency and state official, they were not answerable under the Sherman Act. The district court granted defendants' motions and the Fifth Circuit affirmed. The Court of Appeals concluded:

> . . . the League is a governmental entity exempt from the Sherman Act.
>
> As this Court has previously said, '. . . it is settled that neither the Sherman Act or the Clayton Act was intended to authorize restraint of governmental action.' *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968).

The language of the *Saenz* case is clear, however, its applicability to this case is less certain. *Saenz* involves a state instrumentality, namely the UIL, acting in a capacity and

in an area that is generally considered to be exclusively state governmental activity, i.e., education of its citizens. The instant case does not present so clear a governmental activity. These plaintiff cities are engaging in what is clearly a business activity: activity in which a profit is realized. It is for this reason that this court is reluctant to hold that the antitrust laws do not apply to *any* state activity. However, in light of the clear language and implication of the *Saenz* case it shall be this court's holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States.

In order to clarify the record, and place the issue in the most favorable posture for appeal, it shall be the order of the court that LP&L's motion to amend its counterclaim be granted and the entire counterclaim, as amended, be dismissed.

/s/ FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE

Worth Rowly, Esq.
George Spiegel, Esq.
Robert E. Winn, Esq.
Tom F. Phillips, Esq.
Denis McInerney, Esq.
Andrew P. Carter, Esq.
William O. Bonin, Esq.
Walter E. Workman, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1909

D. C. Docket No. CA-73-1970 "E"

CITY OF LAFAYETTE, LOUISIANA AND CITY OF PLAQUEMINE, LOUISIANA, *Plaintiffs and Appellees,*

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL., *Defendant and Appellant.*

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1976

Issued as Mandate: Oct. 18, 1976

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 4, 1976

TO ALL COUNSEL OF RECORD

No. 75-1909—City of Lafayette, LA and City of Plaquemine, LA v. Louisiana Power & Light Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, CLERK
/s/ By SUSAN M. GRAVES, DEPUTY CLERK

/smg

cc: Mr. Andrew P. Carter
Mr. Tom F. Phillips
Mr. Jerome A. Hochberg
Mr. Robert C. McDiarmid
Mr. Robert E. Winn

APPENDIX E

Sherman Act

SEC. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

SEC. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act

SEC. 3

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

APPENDIX F

Louisiana Constitution of 1974 (Effective January 1, 1975)

ARTICLE VI. LOCAL GOVERNMENT

PART I. GENERAL PROVISIONS

Section 7. Powers of Other Local Governmental Subdivisions.

Section 7. (A) Powers and Functions. Subject to and not inconsistent with this constitution, the governing authority of a local governmental subdivision which has no home rule charter or plan of government may exercise any power and perform any function necessary, requisite, or proper for the management of its affairs, not denied by its charter or by general law, if a majority of the electors voting in an election held for that purpose vote in favor of the proposition that the governing authority may exercise such general powers. Otherwise, the local governmental subdivision shall have the powers authorized by this constitution or by law.

Louisiana Constitution of 1921 (as amended)

ARTICLE XIV. PAROCHIAL-MUNICIPAL AFFAIRS

SECTION 40. MUNICIPALITIES; CHARTERS AND POWERS; HOME RULE

(d) The provisions of this constitution and of any general laws passed by the legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith. Subject to the foregoing restrictions every municipality shall have, in addition to the powers expressly conferred upon it, the additional right and authority to adopt and enforce local police, sanitary and similar regulations, and to do and perform all other acts pertaining to its local affairs, property and government which are necessary or proper in the

legitimate exercise of its corporate powers and municipal functions.

Louisiana Statutes Annotated (LSA)

R.S. 33:621

The inhabitants of the city shall continue a body politic and corporate by its present name and, as such, shall have perpetual succession; may use a corporate seal which it may alter at will; may sue and be sued; may acquire property in perfect ownership or lesser interest by purchase, donation, appropriation, lease, or lease with the privilege to purchase for any municipal purpose, and may also acquire all excess over that needed for all such purposes, and sell or lease such excess with proper restrictions in order to protect and preserve the improvement; may sell, lease, hold, manage and control such property, and make any and all rules and regulations, by ordinance or resolution, which may be required to carry out fully the provisions of any conveyance, or will, in relation to any gift or bequest or the provision of any lease by which it may acquire property; may acquire by condemnation or otherwise, construct, own, lease, and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other communities; may assess, levy, and collect taxes for general and special purposes; may borrow money on the faith and credit of the city by issue or sale of bonds, notes, or other evidences of debt, on the security of the municipality, or of any improvement or excess property thereof; may appropriate money out of the city treasury for all lawful purposes; may create, provide for, construct, and maintain all things of the nature of public works and improvements; may grant franchises and licenses and fix the terms and regulate the exercise thereof, and no waiver or forfeiture of the power to regulate publicly operated public utilities, may be effected; may levy and collect assessments for local improve-

ments; may define, regulate, prohibit, abate, suppress, or prevent all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the inhabitants of the city, and all nuisances and causes thereof; may regulate and control the use, for whatever purpose, of the streets or other public places; may create, establish, abolish, and organize offices, and fix the salaries and compensations of all officers and employees except as provided in any applicable civil service laws; may make and enforce local police, sanitary and other regulations; and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the city and for the performance of the functions thereof. The city shall have all the powers that are granted to the existing municipality by general or special laws; and all such powers, whether express or implied, shall be exercised and enforced in the manner prescribed by this Part, or when not prescribed herein, in such manner as shall be provided by ordinance or resolutions of the commission.

R.S. 33:4163

The municipal corporation, parish, political subdivision, or taxing district may sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution.